Right to Life of Michigan

Peaceful life-affirming solutions.
http://www.rtl.org

June 3, 2010

H.B. 4015: Releasing "Sealed" Original Birth Certificates Analysis of Rights, Laws & Policy

In legislative sessions dating back to the early 1990's, Right to Life of Michigan has opposed the nonconsensual releasing of original birth certificates that were sealed as part of a "confidential" adoption in the time period of 1945 to 1980. The basis for our opposition was rooted in the concern that birth parents who either sought or were otherwise assured of permanent anonymity would have that commitment breached without their consent. Similarly, some adoptive parents preferred the sealed certificate to provide anonymity and security in their raising of the adopted child without involvement of the birth parents.

Right to Life of Michigan was deeply involved in the adoption code update back in 1992-93 that created the Confidential Intermediary (CI) system as a means for both adoptees and birth parents to search for one another without resorting to nonconsensual release of original birth certificates. While no system established to address a complex human challenge can operate perfectly, the CI process offers a legitimate means of balancing the rights of the parties involved.

The social environment regarding adoption, and in particular adoption "reunions," has changed quite dramatically since the early 1990's. The concerns held then by many adoption agencies, providers and advocacy groups about the potential negative effects of unwanted/unfavorable reunions on the public's understanding and perception of adoption seem less poignant in our current era of much more open adoption. Still, there are legitimate competing claims regarding this legislation from various perspectives and none should be summarily dismissed to the benefit of other claims.

What drove the eventual results of the debate on this issue in 1992-93, and which should prevail again today, is a consideration of, and a legitimate effort to balance, the rights of the parties involved. The hearings which have already been held on this legislation have provided both compelling and spurious arguments, forceful logic and illogical statements, and most definitely, profound emotional impact. This analysis is an attempt to sort through these factors in order to provide a way forward in resolving this set of conflicting interests and claims.

Part I will examine the interests/rights/claims of the various parties involved. Part II will provide a historical review and analysis of Michigan law as it evolved from 1939 onward. Many of the legal presumptions and policy assumptions being debated around this legislation do not match the policies "on the books." A fair and accurate picture of Michigan law over time will be helpful bringing opposing viewpoints to a common reference point for further discussions.

Part III looks at the concept that there existed a "legal contract," either explicit or implied, with birth parents that guaranteed permanent anonymity at the time they released their children for adoption. Part IV looks at conceptual and practical implications for crafting legislation to ultimately resolve this matter.

Executive Summary

- Adoptees have claims on access to their identity (via their original birth certificate) that are rooted in fundamental individual rights.
- Birth parent claims to protected permanent anonymity do not carry the weight of fundamental rights but are still significant.
- Credible presumptions cannot be made for policy making purposes about the knowledge or intent of birth parents at the time of adoption or of their state of mind today regarding reunions.
- Adoption (court) records and birth certificates are two different things, governed by two separate sets of laws.
- Adoption records were sealed in 1945, original birth certificates were not statutorily sealed until 1968.
- The supposition has been made that when adoption records were sealed in 1945, it was the equivalent in law of providing permanent anonymity to birth parents. In essence, the claim is that birth parents were "promised" their identities would be permanently kept secret. This presumption is not sustained in law for the following reasons:
  - adoptees retained in law inheritance rights from their birth families until 1974.
  - the 1945 law provided that "sealed" adoption records could be inspected for "good cause" regardless of any 'promise' to the birth parents.
  - Attorney General Opinion 1765 (year 1954), found that adoptees wanting to confirm their adoption had "good cause" to inspect the court adoption records.
  - When signing the release of parental rights document, birth parents surrendered ***all rights*** concerning the child, including control over the adoptee's future access to records.
  - Birth parent identities were not prohibited from appearing on orders of adoption until 1966.
  - Birth certificates for children born out of wedlock were explicitly sealed, while the same section of law addressed numerous details regarding birth certificates for adoptees without sealing them.

PART I – Interests, Claims and Rights

Adoptee Rights

From an individual perspective, adoptees present the strongest assertion of individual rights being the

basis for approving this legislation, particularly as they can assert certain harms that can potentially come to them in absence of directly knowing their birth family identity and history. Before addressing these rights, there are two generic "rights" arguments asserted by adoptees that on the surface have great appeal, but upon deeper review, suffer some legal or logical weakness. First, is the claim that, "My birth certificate is mine, it is about me, and I have a right (even a "constitutional" right) to information about me." While this is true in certain regards, it is also incomplete. Birth certificates are not only a record about the child born, but ***also about the parents***. Acknowledgment as the mother or father of a child on a birth certificate carries significant legal implications for either or both parents identified. Furthermore, birth certificates are a creation of the state, and as such, are a hybrid document that serve the interests of the child born (a means of identify for critical things like citizenship, legal identification, claims of inheritance, etc.) and public interests.

A second assertion that suffers from flawed premises is that when birth parents (usually a birth mother) agreed to, or specifically requested, a confidential adoption, it was a contract agreement to which the adoptee was not a consenting party. Logically speaking this is a grievance for which adoptees could challenge any element of an adoption. Adoptees do not get to consent to who their adoptive parents will be. In some instances the decision by birth parents to have a confidential adoption was done expressly with a desire to serve the best interests of the child (even if later it was discovered not to serve those best interests).

It is ironic to consider the argument of whether birth mothers have a "right" to sign a "contract" denying an adoptee his/her birth certificate, when the very right of the child to be born is not protected in law. This is neither a terse nor cynical means of "injecting the abortion debate" into this discussion. It is a matter of comparative law. If a woman retains the constitutionally protected right to decide whether a child is even born, extending to her the "right" to contract for a confidential adoption seems rather trivial in comparison. After all, do her reproductive/parental "rights" end at birth?

There are three legitimate and persuasive arguments in support of adoptees' claim or "right" to their original birth certificate. First, equal treatment under the law would suggest that if every other person is entitled to his or her original birth certificate, the adoptee is equally entitled. Yet it must be acknowledged that an adoptee does have a birth certificate, albeit one that lists adoptive parents rather than birth parents. As has been noted in committee testimony, in the post-9/11 era, these birth certificates have in some cases become a security and liberty of movement complication.

Second, adoptees have a compelling argument that they deserve information about family health history. This could literally be a matter of life or death if the adoptee is unaware of a genetic predisposition to a dangerous but preventable medical condition. If the fundamental rights to life, liberty and property are to be preserved, then laws which prevent individuals from having information that would potentially save their life could be interpreted as unconstitutional, in the absence of a compelling governmental interest (as opposed to a private interest of the birth parents).

Third, adoptees have a compelling claim to know their relational identity for purposes of marriage. The fundamental right (liberty interest) to freely consent to marriage is compromised when adoptees do not know their family heritage. Again, one could argue that depriving individuals of this information through laws sealing original birth certificates, in the absence of a compelling state interest, not a private interest, is unconstitutional.

These latter two arguments can be countered by the argument that certain due processes of law do exist which facilitate these adoptee rights being given proper accord. Namely, a court may authorize release of an original birth certificate for "good cause." Secondly, the CI system allowing either an adoptee or a birth parent to seek out the other party provides a due process for obtaining vital information. Still, the burden of proof, it would seem, would fall upon the state to articulate its compelling state interests in maintaining birth parent anonymity (essentially on behalf of birth parents).

The interests of the state and birth parents require analysis within this context.

Birth Parent Rights

There are two birth parent rights/claims that are implicated by the potential releasing of original birth certificates. One is limited essentially to the maintenance of a "contract" of presumed permanent anonymity. The other claim is related, namely, prevention of potential harm from an undesired contact. Birth parents do not have an inherent legal "right" to a confidential adoption. But to the extent that the option has existed, and still does exist, then the terms of such an arrangement should be legally binding. In some circumstances, bringing to light a long-maintained confidentiality about an adoption could be very detrimental to various parties involved. Based on anecdotal evidence, this may represent a minority of the cases, but the magnitude of impact resulting from such a confidentiality breach cannot be dismissed.

A number of presumptions about birth parents have surfaced in this debate which must be put into perspective. First, we cannot presume what the birth parents' desires (especially birth mothers) with regard to confidentiality were at the time of release for adoption. Some birth mothers were clearly not given a choice at the time regarding confidentiality. But some were fully aware of the confidentiality and have every expectation that it will be preserved. Second, it is difficult to presume that there are birth mothers today who believe their confidential adoption precludes a reunion that they might desire today. When we have television programs airing called, "Find My Family," it is quite apparent to our society at large that confidential adoptions need not be a permanent reality under law.

One potential conclusion that could be drawn is that if birth parents remain anonymous today, it is because they choose to so remain. Yet others will hold to the understanding that their case is permanently sealed regardless of the cases or reunion stories they are seeing in the media. They don't necessarily desire anonymity, they just don't believe their situation would allow for a reunion. Presuming to know the mind of birth parents either at the time of placement or currently is pure speculation and cannot be presented as validation for a position either for or against the legislation.

Adoptive Parent Rights

The primary interest or claim that adoptive parents could assert regarding confidential adoptions is the one that partially motivated the sealing of adoption records and birth certificates in the first place. Adoptive parents sought a level of insulation from the birth parent(s) potentially intruding upon their raising of the adoptee. The circumstances of the child's conception or aspects of the birth parents' identity might also be something the adoptive parents may have motives to shield from the adoptee at least until adulthood, or perhaps indefinitely.

These adoptive parent rights arguably wane as the adoptee reaches adulthood and develops the independent capacity and maturity to decide what information they desire and do not desire. The adoptive parents' role in deciding what to "protect" the adoptee from with regard to this type of information cannot be persuasively argued to supersede a desire or assertion on the part of adult adoptees to discover information about themselves.

Prospectively, however, the option of a confidential adoption must remain available going forward as some birth mothers and some adoptive parents find this level of anonymity necessary to making an adoption placement work. The presumption under current law is that a denial of access to birth information remains in place unless or until a birth parent rescinds that denial. This current policy (post-1980) allowing for permanent anonymity in confidential adoptions, however, should be revisited in light of the analysis provided above. The question must be probed whether some birth mothers currently seeking anonymity would reject the adoption alternative if they were told that adoption records and birth certificates would be open to the adoptee (and presumably only the adoptee) once the adoptee becomes an adult. Right to Life of Michigan would not endorse a policy that might lead a woman to choose an abortion over giving birth and placing her child in a loving home.

Adoption Agencies/Facilitators

Two concerns have been raised by adoption agencies and facilitators regarding the releasing of original birth certificates. The first concern, also advanced by the Family Law section of the State Bar of Michigan, is that consistency and fairness in the law speak against this retroactive statutory change. The integrity of "promises" or commitments made in the past should be honored. The second concern is related in that the integrity and consistency of promises made today and in the future could be called into question. In short, the retroactive change would undermine the legal and relational credibility of adoption practices today. These stakeholders have a strong commitment and obligation to maintain the credibility of adoption practices. As stewards of adoption their concerns cannot be summarily dismissed.

The relevant factor regarding these concerns is determining to what extent they are hypothetical concerns versus actual outcomes. There is at least a minimum obligation to examine whether such credibility effects have occurred in states that have retroactively opened adoption records or birth certificates. Since this proposed policy is not being offered in an experiential vacuum (i.e. other states have done this), further analysis of empirical evidence should guide the deliberations on this matter. Evidence produced by supporters of the legislation suggests that adoption rates have not been negatively affected in states with open or retroactively opened records. It appears enough evidence could be presently gathered to provide a dispositive answer to this question.

PART II – History/Evolution of Michigan Adoption Record & Birth Certificate Law

The first important point that must be made is that there are two different portions of Michigan law which primarily control these matters. Laws regarding adoption proceedings and the records produced thereof are guided by statutes governing the courts. Laws regarding the creating, storing, revising and

sealing of original birth certificates are part of the public health code/vital statistics sections of Michigan law. The following historical review/analysis will expose that the two portions of law were not consistently amended to work in concert with each other from 1945 until 1968. ***In addition, when read in conjunction with each other, the sets of laws do not create a reasonable presumption or conclusion of law that birth certificates, as opposed to "adoption records" have been deemed "confidential/sealed" since 1945. A careful examination of the evolution of these laws leads to a conclusion that adoptee original birth certificates were not statutorily ("officially") sealed until 1968.***

Now for some immediate caveats to the statement above: It is not a conclusive statement, but proposed interpretation of the laws. A case could perhaps be made that there was a reasonable presumption on the part of everyone involved in adoptions after 1945 that original birth certificates were to be sealed. But that presumption is not backed by actual statutory language until 23 years later. [The author acknowledges that there is a degree of "shock factor" in stating such a conclusion.]

The "Non-Parallel" Tracks of the Probate and Public Health Codes

The framework on which current adoption law is written was established in the probate code by Public Act 288 of 1939, Chapter 10, Michigan Statutes Annotated 27.3178 (541-546). In PA 288 there is virtually no mention of sealing adoption records or birth certificates. Court records of proceedings in adoption cases would presumably be considered fully open public records, accessible to anyone.

One important provision contained in Section 6 (546) states, "That adoption under the provisions of this section shall not affect the right of the adopted child to inherit from or through its natural parents."

This provision explicitly establishes that while birth parents are surrendering all rights and claims to the child, adoption does not eliminate the child's claims upon their rights of lineage. Because adoption records are open at this time, this provision presumes the right to know the birth parents' identity, and the potential to make inheritance claims are preserved.

Chapter 10 of the probate code was significantly amended by PA 324 of 1945, including the introduction of "sealed" adoption records. Section 2 [MSA 27.3178(542)] outlines what the adoptive parents' petition to the court must contain, including the following two pieces of information:

"(a) The name, date, and place of birth, and place of residence if known of the child sought to be adopted;"

"(f) The names of the parents of the child, and the address of each living parent if known: Provided, That if the rights of the natural parents have been terminated by a court of competent jurisdiction, the names and addresses of parents if known ***may*** be omitted." (emphasis added)

An entirely new Section 4 is added to the chapter which reads in total: "Said child's birth certificate or other satisfactory proof of date and place of birth, if obtainable, shall be filed in the case."

The section does not clarify that a "copy" of the original birth certificate, if obtainable, is to be filed. But it is not reasonable to suggest that this section is authorizing that the original birth certificate be

obtained from the county or state registrar who is in possession of that original document. Birth certificates are permanent vital records that remain under the control of the registrars where they are filed and the registrars authorities and duties are dictated by the public health code, not the probate code. The certificate referenced in Section 4 must be presumed to be a copy.

A new Section 9 is added to Chapter 10 which restates that an adoptee obtains full and equal inheritance rights to the adoptive parents' estate as would a child born to those parents. The section retains and slightly amends the 1939 language about adoptees retaining inheritance rights from their birth parents. That language was amended to read: "That nothing herein shall affect his right to inherit from or through his natural parents."

Again, if the law explicitly protects an adoptee's inheritance rights, it presumes that the adoptee would have a means of exercising those rights by having knowledge of one's birth parents. It would be a contradiction in law to insure permanent birth parent anonymity (from the adoptee, not just the public) while at the same time protecting an adoptee's inheritance rights.

Section 11 of Chapter 10 – The "Sealing" of Adoption Records

The crucial section of law regarding sealed adoption records comes with the addition of Section 11 in the 1945 law. The section reads in its entirety:

"All records of proceedings in adoption cases and all papers and books related to such proceedings shall be kept in a separate file and shall not be open to inspection or copy except upon order of any court of record for good cause shown expressly permitting inspection or copy. No person in charge of adoption records shall disclose the names of the natural or adoptive parents of a child unless ordered to do so by such court."

How this section is broken down and interpreted is key to the debate over H.B. 4015. Part of this interpretation addresses what the section actually says, and more subjectively, what it presumes, what it implies, and how it interacts with other provisions in the chapter. Selectively reading this section in isolation from the effective language, presumptions and implications of the entire chapter can lead to conclusions that may be untenable or even self-contradictory.

First, it is clear that all court records of proceedings, papers and books related to an adoption are to be sealed from "inspection or copy" except by court order "for good cause." Taking into account Section 4 previously, if there is access to the adoptee's birth certificate, it is to be included among the "papers" that make up the "adoption record." It is important to distinguish that Section 11 seals the records and documents collected or generated by the court during the adoption proceedings, of which the birth certificate may be a part. It does not state that any and all copies of the original birth certificate shall be transferred to and contained within this probate court record. To imply that Section 11 authorizes such would contradict duties and authorities granted to registrars under the public health code.

Undoubtedly the previous status of law, where records were presumed fully open to public inspection, is being reversed. Now ***anyone*** desiring to review an adoption record must show "good cause" such that a court shall issue an order to that end. It is critical to note that the law ***in no fashion*** attempts to limit ***who*** may petition to review a record. Thus, members of the adoption triad, birth siblings, the

executor of the birth parents' estate, a law enforcement agency investigating a crime – anyone – who can show "good cause" can petition to inspect an adoption record.

What is also clear is that "good cause" has no definition. Its meaning is left entirely to the discretion of the court that is petitioned. There is on record Attorney General Opinion No. 1765, issued April 2, 1954, where questions were raised with regard to releasing adoption records per a court order. In the course of affirming the clear language of the statute that the record is only accessible pursuant to a court order, the attorney general noted the following:

> "However, a probate court is, of course, a court of record and under the statute is authorized to enter such order upon showing good cause as therein provided. Certainly the request by the adopted person for a copy of the order for his own purposes would constitute good cause."

It was abundantly clear that the attorney general did not read the sealed record law to provide permanent anonymity, particularly at it relates to the adoptee. The fact that a "good cause" exception is found in the law indicates that an ironclad promise of permanent anonymity was not presumed by the law.

Section 11 has the second provision stating that, "No person in charge of adoption records shall disclose the names of the natural or adoptive parents of a child unless order to do so by such court." This presumes that a court may issue a limited order that does not grant inspection of the entire adoption record, but instead, authorizes a keeper of records to inspect the record and provide to the petitioner the names of either sets of parents. The implication of this provision is that providing only the names may be sufficient to satisfy the petitioner's need without having to see all the records and papers.

It must be noted that the names of neither sets of parents are to be disclosed. Hence, the "protection" of confidentiality by sealing the records was clearly viewed as a "two-way street." Sealing the records was designed to protect adoptive parents as much as birth parents. There is no sense of exclusivity in protecting ***only*** the anonymity of the birth parents.

Unquestionably the "confidentiality" of Section 11 was designed to shield the adoption records from ***public*** inspection, which had previously been allowed under PA 288 of 1938. It is also clear that permanent anonymity for the either sets of parents is not guaranteed. Any finding of "good cause" by a court can open the record to ***any*** person so showing.

Two years later, Section 11 was amended by Act 358 of 1947 to authorize the creation of a new birth certificate for the child that is to make no reference to either the birth parents or the adoption. (Note: by 1948 the Probate Code was recodified as Chapter 710, with Section 11 becoming 710.11.) The 1947 amendment to Section 11 added the following language:

> "The state health department shall furnish to the adopting parents a certificate of registration showing: (1) name of adopted child, (2) names of adopting parents, (3) date of birth, and (4) place of birth as given by probate court confirming adoption, in such manner as not to disclose the adoption of the child."

Be aware that state law at that time was interchangeably using the terms "registration of birth" and "birth certificate." Hence, PA 324 of 1945 spoke of including the "child's birth certificate" in the records, while Act 358 of 1947 above references a "certificate of registration" because under law, births were said to be "registered" with the state or district registrar.

It is critical to note that this 1947 Act is the first reference to the state health department in the probate code directing specific actions to be taken as a result of an adoption. It is equally important to note that no directive is made to seal the original birth certificate from future access (as would later be the case in PA 212 of 1968). The purpose of the 1947 amendment, on its face, was to provide a document to the adoptive parents shielding the adoption from the adoptee or other public awareness in the future. Despite this added layer of confidentiality, providing this revised birth certificate cannot reasonably be interpreted to be providing either explicit or implied permanent anonymity to birth parents.

Section 11 was amended again by PA 132 of 1953 with two changes. The first is that if a petition were filed requesting inspection of an adoption record more than 90 days after the adoption was finalized, the court has the option to order public notice and hearing on the petition. Second, it provided clarification that new birth certificates issued for an adoption are to look as much like a standard birth certificate as possible. The amendatory language to Section 11 follows as highlighted.

> [Courts may order inspection of record for "good cause"...] ***"Provided, That the court 90 days after the final order of confirmation has been entered shall not permit copy or inspection of any adoption proceedings except upon a sworn petition setting forth the purpose of such inspection or copy and the court may in its discretion order notice and hearing upon such petition.***
>
> "The state health ***commissioner*** shall furnish to the adopting parents a certificate of registration showing: (1) name of adopted child, (2) names of adopting parents, (3) date of birth, and (4) place of birth as given by probate court confirming adoption, in such manner as not to disclose the adoption of the child; ***Provided further, That any birth certificate hereafter issued to an adopted child shall make no reference to adoption and shall conform as near as possible in appearance to birth certificates issued in other cases.***

This amendment establishes a right of notice for parties to the adoption if someone is petitioning to inspect the record. Again, it is difficult to suggest that permanent anonymity is a presumption of law when the section establishes these explicit details for a process to inspect the record, including notice of the petition. This is the second time the 1945 record "sealing" law was amended without referencing a seal on the original birth certificate, even while it directs the state health commissioner to create new birth certificates in a specific manner. Either of these two post-1945 amendatory laws could have explicitly sealed the original birth certificate that was retained in the public health records, but they did not do so.

This later point becomes relevant as we examine another 1953 statute, PA 100 adopted just 8 days earlier, which provides various details as to how birth certificates from adoption cases are to be handled. Section 12 (Compiled Law 326.12, precursor to the present public health code) is the main

law governing the creation of birth certificates. As Section 12 provides, the birth of each child is to be registered within 5 days of birth with a certificate filed with the registrar of the district in which the birth occurred.

[Authors note: The following section addresses cases of children born out of wedlock, using the common parlance of 1953, describing them as "illegitimate births." While this would not be a preferred term of use today, it will be used in this section, to remain consistent with the language of the statute.]

Presumably as a matter of privacy and to avoid any public stigma, an illegitimate birth is to be registered exclusively with the state department of health and ***not*** the local registrar. Importantly, the birth certificate of an illegitimate child is ordered sealed ("not subject to public inspection") except to the child or the mother, or by order of a court.

This explicit sealing of the illegitimate birth certificate in the health code creates a clear contrast with the absence of a similar directive to seal the original birth certificate in an adoption. The portion of Section 12 pertaining to birth certificates for adoptees is provided at length below to demonstrate its numerous elements and directives regarding said certificates. Again, the absence of the sealing order in contrast to the sealing provision for illegitimate births is clear.

> "Whenever a decree of adoption is entered in any court of competent jurisdiction in the State of Michigan, a record of the adoption shall be filed with the state department of health on a form prescribed by the state health commissioner. This record shall bear the new name of the child, the name of the foster [adoptive] parents, and the date and place of birth as nearly as may be known, but it shall make no reference to the natural parents or any fact of illegitimacy. This record of adoption shall be filed with the birth records of the state and certified copies shall be issued upon request. Such certified copies shall be accepted in all courts and places as prima facie evidence of the date and place of birth of said child: Provided further: That any birth certificate hereafter issued to a child adopted after the effective date of this act shall make no reference to adoption and shall conform as near as possible in appearance to birth certificates issued in other cases: Provided further, That judges of probate shall file a new certificate in conformance with this section for those adopted children for whom a certificate of adoption is already on file with the Michigan department of health upon formal request to the judge of the county in which the child was adopted by either or both of the foster parents or the person to whom the record pertains or the state health commissioner: Provided further, That when judges of probate issue a new certificate to stand in lieu of one already on file with the Michigan department of health, the Michigan department of health shall be so notified in writing."

Thus, upon completing an adoption the court is to fill out a record of adoption form created by the health commissioner. That form, with the child's new name, etc., will then be filed "with the birth records of the state" - namely in the file with the original birth certificate of the child (assuming there is one). And consistent with PA 132 moving through the Legislature at the same time, the court hereafter will issue a new birth certificate that matches the appearance of a standard birth certificate. The section also directs probate judges to issue new birth certificates retroactively at the request of the adoptive ("foster") parents. If a judge issues a new certificate retroactively, that must be sent to the health

department. Thus, there is some convergence of language between the probate code and the adoption code as to the nature of the birth certificates.

But regardless of this first stage of convergence, there is no language in either code that explicitly seals the original birth certificate held by the state health department. The adoption record, Yes. The original birth certificate within the state health department, No. This absence of a directive to seal is in contrast to language earlier in the same health code section explicitly sealing birth certificates for illegitimate births.

A minor amendment was made to Section 326.12 by PA 35 of 1960, requiring that the decree of adoption be filed with the county clerk in the county of adoption, as well as with the state health commissioner. This had no impact on the original birth certificate. Coming 7 years after PA 100, and 15 years after the sealed records law, there was no explicit effort to seal original birth certificates.

In 1966, PA 80 amended the probate code by adding a new section 7b (CL 710.7b) that expressly prohibited the names of the birth parents or any name given to the child at birth from appearing on the order of adoption. Recall that Section 2 of 1945 PA 324 stated that the birth parents' names ***may*** be omitted from the order of adoption. The new section 7b states that "the order of adoption and exemplification of record ***shall not*** contain the name of the child's parents or mother or the name bestowed upon the child before the adoption."

Thus, for 21 years after the court adoption records were sealed, there was the option or the potential that information about the child's birth parents or birth name could be part of the order of adoption given to the adoptive parents and filed with the state health department, the latter not being sealed by law. If there was an intention or presumption in 1945 to create permanent anonymity for birth parents, that is clearly not reflected in the language of the laws as they evolved over two decades.

The harmonizing of the probate code and the public health code regarding adoptees birth certificate finally occurred in 1968 with the passage of Public Acts 148 (probate code) and 212 (health code). Section 11 of the probate code was amended to clarify that "No person in charge of adoption records shall disclose the names of the natural or adoptive parents... except to meet requirements of the director of public health for the purpose of creating a new certificate of birth in the adoptive name and sealing the original birth certificate.

PA 212 then amended the health code Section 12 to declare:

"Whenever a certificate of birth is created on the basis of a record of adoption, thereafter, the original certificate of birth and the record of adoption shall not be subject to inspection except upon order of a court of competent jurisdiction or as provided by regulation of the state director of public health."

A later provision in PA 212 reinforced the sealed nature of original birth certificates as it relates to local registrars. "When a new certificate of birth is established by the state director of public health, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this state shall be sealed from inspection or forwarded to the state director of public health as he shall direct."

A third provision offered a directive for when an adoption is annulled. "Upon receipt of notice of annulment of adoption, the original certificate of birth shall be activated and the new certificate and evidence shall not be subject to inspection except upon order of a court of competent jurisdiction."

Thus, even if it was presumed by the probate court or by parties to an adoption that original birth certificates were to be sealed, the sealing was not officially part of the duties of the keepers of birth certificates until 1968, 23 years after the sealed records law and only 12 years prior to the end of the sealed records era. It appears that in the absence of a statutory authorization to seal, prior to 1968 if a person had the name given to an adoptee at birth, he or she could request and receive the certificate.

One can only speculate as to why these two sections of code were not harmonized as to original birth certificates for 23 years. It may be that in practice the state and local registrars did not release original birth certificates between 1945 and 1968 because of an implied understanding that the files were to be sealed. But those making a case that original birth certificates were sealed by law from 1945 to 1980 would only be partially correct. Original birth certificates were not fully sealed from inspection from 1945 to 1968.

PART III – The "Contract" of Birth Parents Releasing for Adoption

The idea or suggestion has been raised repeatedly that birth parents, when releasing their rights to their child for adoption, were engaging in a contract that provided permanent anonymity. This may have been verbally implied to birth parents through any number of persons connected to the adoption, including attorneys or judges who may have made reference to the adoption records being permanently sealed. The record indeed would be sealed. But it could also be inspected for "good cause" - a term without definition and certainly a very large caveat to any promised or implied "permanent" anonymity.

More to the point, however, the only document that could be considered a birth parent's "legal contract" regarding the adoption is the "Release of Child" form signed by the birth parent(s). The language used in the release form is stark:

"...that once having executed this release I thereby lose any and all rights in, to and concerning said child forever."

The language could not be more complete in severing any connection over any future event that might occur in the child's life, including whether the child would some day have legal rights to access his or her original birth certificate. Birth parents relinquished "any and all rights... concerning said child forever." That would appear to include any right or say in what, when or how a child might have access to information about his or her own birth or family origin.

It clearly was the opinion of the state attorney general in 1954 that an adoptee's petitioning for information about his or her own adoption "would constitute good cause" for inspecting the record. Because attorney general opinions serve as authoritative interpretations of Michigan law in the absence of a court ruling, at least beginning in 1954, permanent anonymity could not be considered statutorily protected, if permanent anonymity was ever protected.

By the plain language of the 1945 PA 324, permanent anonymity was not explicitly provided, but was explicitly denied by the "good cause" exception. Permanent severing of family connections was clearly not assumed in law as birth family inheritance rights for adoptees were preserved. By the language of the release signed by the birth parents, permanent anonymity was not promised and was explicitly removed from the control of the birth parent. By the opinion of the attorney general, it was not implied or protected. By the lack of consistency between the probate code and the public health code, sealed original birth certificates was not effectuated in law until 1968.

Part IV – Policy Implications for H.B. 4015: Conceptual and Practical

* The first conceptual implication that must be drawn is that the presumption that permanent birth parent anonymity was promised as a matter of law or contract is not valid. That does not make concern for birth parent interests or claims invalid, however. Efforts going forward in settling this issue should attempt to provide maximum concern for difficult circumstances that could impact birth parents and their existing families if birth certificates are made accessible.

* Second, to the extent that adoptees have valid rights and claims that are negatively affected by the continued seal on their birth certificates, ***rights delayed are rights denied.*** Opportunities for adoptees to have vital health information or other familial connection, possible reunions, etc. are disappearing as birth parents and adoptees age and die.

* The fact that Michigan law does not allow ready access to sealed birth certificates in cases where reunions have already taken place is inexplicable. ***This malady of law can and should be immediately rectified.***

* Previous discussions regarding H.B. 4015 have included a suggestion to attempt to broadly notify birth parents of this era about a change in the law regarding sealed birth certificates. This suggestion is not at all practical, creates many more complications than solutions, and is better not pursued. If notifications are to be attempted, they should be on a case-by-case basis similar to the CI process.

* No aspect of legislation should eliminate the option of confidential adoptions going forward. As previously noted, a time limit for confidentiality could be further considered for future adoptions. The problems created by sealed records and anonymity in the past need not be replicated in the future.

* The Confidential Intermediary system has worked effectively in a significant number of cases and should be maintained to the degree that it can facilitate smooth contacts and potential reunions in cases where sensitivity to birth parent circumstance are warranted. The costs cited in testimony of $250.00 cannot reasonably be considered prohibitive. Perhaps in a true financial hardship case, an exception can be made by the appointing court to reduce or waive the fee, though a funding source for such waivers might be needed.

* A process-oriented legislative solution regarding the release of birth certificates, as the CI mechanism evolved in the 1990's, might entail the following features:

- Original birth certificates should be made available upon request.

- Effort at first contact once the birth certificate is obtained should be through a CI. If the CI cannot locate the party sought, the searching party is free to personally engage more search efforts, notifying the CI if the other party is eventually located so first contact can be through the CI.

- Failure to follow this procedure is a civil infraction (with an appropriate fine) and exposes the person violating the process to civil liability for any harm to an individual from nonconsensual contact.